

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
PORT ST. LUCIE DISTRICT OFFICE

Steven Newton,	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	OJCC Case No. 07-031341RDM
	)	
1st Fire and Security/Oxygen Unlimited,	)	Accident date: 7/2/2007
	)	
Employer,	)	
	)	
and	)	
	)	
Providence Property and	)	
Casualty Insurance Company,	)	
	)	
	)	
Carrier/Servicing Agent.	)	
_____	)	

ORDER DISMISSING PETITIONS FOR BENEFITS

THIS MATTER came on to be heard upon the employer/carrier's (E/C) "Motion to Dismiss" served July 23, 2009. The motion seeks dismissal of Petitions for Benefits (PFB) filed November 1, 2007, December 12, 2007, and February 26, 2008, for lack of prosecution. This constitutes all outstanding PFBs.

HAVING CONSIDERED argument of counsel and being fully advised in the premises, I grant the motion based on the following analysis:

## PROCEDURAL HISTORY

PFBs were filed November 1, 2007, and February 12, 2007. A mediation conference was conducted February 20, 2008, addressing the issues in the foregoing PFBs. The agreement reached resolves the average weekly wage, a period of indemnity benefits, penalties and interest and, as I read it, fees and costs for obtaining the foregoing benefits. The mediation agreement goes on to provide, “Outstanding issues that remain is (sic) compensability of neck and atty fees and costs as to this issue.” A third PFB was then filed February 26, 2008. This seeks the payment of an emergency room bill incurred July 11, 2007.

On May 21, 2008, claimant voluntarily dismissed the PFB filed February 26, 2008, “...without prejudice, except attorney fees and costs.” On May 23, 2008, claimant voluntarily dismissed the PFB filed November 1, 2007, on the same basis. The PFB filed December 12, 2007, was administratively closed although this is a clerical action with no legal impact.

## LEGAL ANALYSIS

Under existing, specific case law on point, the notices of voluntary dismissal filed May 21, 2008, and May 23, 2008, are a nullity. This is because claimant did not dismiss all pending issues. *Perez v. Winn Dixie*, 639 So. 2d 109, 112 (Fla. 1st DCA 1994); *Murillo v. Tri-State Empl. Servs.*, 925 So. 2d 376 (Fla. 1st DCA 2006).

However, guided by a recent district court case, I find the prior case law is not controlling because these decisions were based on different statutes or rules. *See, Vassallo v. Ronnie Goldwire, Consulier Indus., Inc.*, Case No. 1D09-919 (Fla. 1st DCA September 14, 2009) (not final).

*Perez v. Winn Dixie* is an application of the two dismissal rule pursuant to Rule 4.110 of the *Florida Rules of Workers' Compensation Procedure* then in effect. This rule is similar to

then-existing civil rules also indirectly referenced by the *Perez* court.

*Murillo v. Tri-State* apparently deals with a 2002 date of accident. The procedural actions taken by the parties therein is unknown from the text of the opinion. Nonetheless it appears likely the revamped *Florida Workers' Compensation Rules of Procedure*, particularly Rule 4.020(c) and Rule 4.075(d) were applicable. (The *Workers' Compensation Uniform Practices and Procedures* also in effect did not address voluntary dismissals.) Under that rule a "claim or petition" could be dismissed by the claimant or petitioner without an order subject to the two dismissal rule. A "claim" is defined as "...any element of a Petition for Benefits or other entitlement for which judicial relief is sought." Claims outside of a petition were limited to petitions for modification, claims for reimbursement from the Special Disability Trust Fund, claims pursuant to section 440.42 and those pertaining to attorney's fees and costs. *Fla. R. Work. Comp. P.* 4.025. The supreme court rules, however, were repealed by *Amendments to Fla. R. Workers' Comp. P.*, 891 So. 2d 474, 479 (Fla. 2004).

With this turn of events, both a statute and a rule now interact to govern the present circumstances. Section 440.25(4)(i) allows the dismissal of a *petition* for lack of prosecution when certain occurrences do not take place during the twelve months preceding the motion. A petition, according to *Vassallo v. Ronnie Goldwire, Consulier Indus., Inc.*, contemplates a document filed pursuant to section 440.192. Although it is no moment either way, the present rule allows for the voluntary dismissal of "a claim or petition." *Fla. Admin. Code R.* 60Q-6.116(2). "'Claim' means each assertion of a legal right or benefit under Chapter 440, Florida Statutes." *Fla. Admin. Code R.* 60Q-6.102(1). Hence, whether *Perez* controls so that claimant's prior voluntary dismissal actions are a nullity or whether the present analysis is correct, to wit, claimant may voluntarily dismiss portions of a Petition for Benefits, the result is the same. More

than one year has expired on the existing complete petition or what is left of the original petition so that, on its face, the petitions of November 1, 2007, December 12, 2007, and February 26, 2008, must be dismissed for lack of prosecution unless good cause is shown.

#### GOOD CAUSE

At the motion hearing itself and subsequently, claimant provides communications from defense counsel requesting an attorney's fee demand. Claimant's counsel candidly advises that in no sense was he misled into not taking action.

I determine that given this proviso, an evidentiary hearing on the good cause issue is unnecessary.

The potential for adverse effect of a dismissal for lack of prosecution is in of itself not good cause otherwise the exception would swallow the rule.

#### FURTHER OBSERVATIONS

The impact of this ruling remains for another day. Initially, the mediation settlement agreement reads as though the compensability of claimant's neck injury and fees and costs attaching to this issue are the only remaining issues. No PFB has been filed on this point anyway.

Secondly, if claimant is entitled to an attorney's fee in the first place, it remains to be determined whether section 440.19 applies to this issue.

#### CONCLUSION

WHEREFORE, the Petitions for Benefits filed November 1, 2007, December 12, 2007, and February 26, 2008, be and the same are hereby

**DISMISSED** for lack of prosecution.

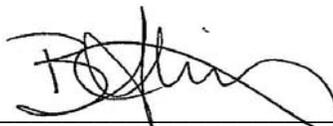
DONE AND ORDERED this 30th day of September, 2009, in Fort Pierce, St. Lucie  
County, Florida.



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I HEREBY certify that a true and correct copy of the foregoing has been emailed to the attorneys listed on this 30th day of September, 2009.



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Assistant to the Judge of  
Compensation Claims

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